CO-OPERATIVE CENTRAL BANK LTD & ORS

v.

RASHID CRUZ ABDULLAH & ORS AND OTHER APPEALS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
DENIS ONG JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NOS: W-02-441-1997, W-01-67-1999, W-02-567-1999 & W-02-615-1999]
21 MARCH 2000

CIVIL PROCEDURE: *Appeal - Appeal against decision of High Court - Judge quashing part of Industrial Court's award - Whether there were serious defects in decision - Whether there was non-disclosure of material facts at ex parte stage - Whether judge was functus officio - Whether joinder of parties necessary for resolution of dispute - Whether appeal should be allowed partially*

LABOUR LAW: *Industrial Court - Function of Industrial Court - Whether confined to administration of justice in accordance with law - Whether could create new rights and obligations between parties - Whether joinder of parties necessary for resolution of dispute*

CIVIL PROCEDURE: *Parties - Joinder of parties - Whether necessary for resolution of dispute - Principles applicable*

As a result of the insolvency of the Co-Operative Central Bank Ltd ('CCB'), Bank Negara Malaysia ('BNM') appointed receivers to assume control and carry on the business of CCB. The receivers proceeded to terminate the services of all of CCB's employees which included the 116 respondents in the present four appeals. Subsequently, when the receivers were discharged and BNM appointed the appointees to administer CCB's affairs, some of the assets and liabilities of CCB were sold and transferred to PhileoAllied Bank ('PhileoAllied'). The respondents, who had set in motion the procedure under s. 20 of the Industrial Relations Act 1967, applied to join the receivers as parties. This application was allowed. However, when an application was made to have the receivers removed as parties because the order discharging the receivers had already been made, the learned chairman

handed down his interim award holding that the receivers were no longer necessary parties and ordered them to be struck out. The respondents applied to the High Court for leave to apply for *certiorari*, which they subsequently obtained.

When the respondents' substantive motion was heard, CCB argued that there had been a suppression of material facts and that leave should be revoked. The learned judge refused; hence, CCB and the receivers appealed against that decision ('Appeal No. W-02-441-1997'). The learned judge also made an order dated 30 June 1997 directing the addition of PhileoAllied and BNM as parties to the motion; the order, however, expressly excluded the appointees of BNM who had taken over from the receivers. Subsequently, the substantive motion was argued and the learned judge made the following orders: (a) he quashed so much of the award of the Industrial Court relating to the striking out of the receivers as parties; (b) he upheld the addition of PhileoAllied as a party to the Industrial Court proceedings; and (c) he quashed so much of the award as refusing to join BNM and its appointees as parties to the proceedings.

Thus, PhileoAllied's appeal ('Appeal No. W-02-615-1999'), BNM's appeal ('Appeal No. W-01-67-1999'), and CCB, the receivers and appointees' appeal ('Appeal No. W-02-567-1999') were against the learned judge's decision. They submitted that there were serious defects in the orders made by the learned judge and his reasons for making those orders because: (i) he failed to address his mind to the fact that material facts had been suppressed by the respondents at the *ex parte* stage; (ii) having made his order on 30 July 1999, he was *functus officio* and it was beyond his powers to make the subsequent orders; and (iii) he failed to appreciate that CCB was the real employer, and that the other parties were unnecessary and ought not to have been added as parties.

Held:

Per Gopal Sri Ram JCA

[1] Although the point on non-disclosure was raised, the appellants were not able to demonstrate to a conviction that the material placed at the *ex parte* stage before the learned judge was at variance substantially with that which was placed before him on the substantive motion. Furthermore, upon careful scrutiny of the evidence at the *ex parte* stage, the court was left entirely satisfied that even if the additional evidence had been placed before the learned judge at the *ex parte* stage, he would have still granted leave. There was, therefore, no merit in this argument. (pp 859 a & 861 a)

[2] It was to be observed that the order made on 30 June 1997 was in response to an application made by a summons-in-chambers. It was an interim order made pending the disposal of the substantive motion. At the interim stage, the learned judge was adding parties and in the final stage, he was hearing the merits of the substantive motion before him. The doctrine of *functus officio*, therefore, had as much relevance to this case as cheese had to chalk. Hence, there was also no merit in this argument. (p 861 c-d)

[3] Viewing the evidence with utmost objectivity, the inescapable conclusion was that CCB, the receivers and the appointees of BNM were all necessary parties to the adjudication of the trade dispute before the Industrial Court. It might well have been the receivers' argument that they were not and had never been the employers of the respondents. However, industrial adjudication is no respecter of labels. In settling disputes between employers and workmen, the function of the tribunal is not confined to the administration of justice in accordance with law. It has not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace. (p 862 b-e)

[4] In respect of PhileoAllied's appeal, the court was unable to agree with the respondents' contention that there was nothing wrong in either the order made by the learned judge confirming the correctness of the addition of PhileoAllied or the adverse comments made by him. It cannot be gainsaid that the rules of natural justice should not be violated. A party cannot be condemned without being heard. Thus, the order of the learned judge in respect of PhileoAllied and his adverse comments about them were entirely unwarranted. Accordingly, PhileoAllied's appeal was allowed, and so much of the orders that upheld the addition of PhileoAllied as a party to the proceedings before the Industrial Court were to be set aside, and the adverse comments to be expunged. (pp 862 g-h & 863 b-c)

[5] In respect of BNM's appeal, having scrutinised the order pursuant to which the receivers were discharged and the appointees were appointed, there was no reasonable factual or legal nexus between BNM and the dispute presently before the Industrial Court. Even taking the most extreme position on the facts, BNM could not be held responsible for the termination of the respondents. Accordingly, BNM's appeal would be allowed in so far as the judge directed the addition of BNM as a party to the proceedings before the Industrial Court. (p 863 g-h)

[Appeals No: W-02-441-1997 and W-02-567-1999 dismissed; Appeals No: W-02-615-1999 and W-01-67-1999 allowed to the extent as on the terms earlier indicated.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ekoran dari ketaksolvenan Co-operative Central Bank Ltd (CCB), Bank Negara Malaysia (BNM) melantik Penerima untuk mengambil-alih urusniaga CCB. Penerima seterusnya telah memberhentikan perkhidmatan kesemua pekerja-pekerja CCB yang mana termasuklah 116 responden dalam empat rayuan semasa ini. Seterusnya, apabila penerima dilepaskan dan BNM melantik penjawat untuk mentadbirkan urusan CCB, sebahagian dari harta dan tanggungan CCB dijual dan dipindahmilikkan kepada PhileoAllied Bank (PhileoAllied). Responden-responden, yang mana telah memulakan usul dibawah s. 20 Akta Perhubungan Perusahaan 1967, memohon untuk memasukkan penerima sebagai pihak kepada usul tersebut. Permohonan tersebut dibenarkan. Walaubagaimanapun, apabila permohonan dibuat untuk menyingkir penerima sebagai pihak kepada usul tersebut dibuat kerana perintahan pelepasan penerima telah dibuat, yang arif pengerusi menyampaikan award interim dan memutuskan bahawa penerima tidak lagi diperlukan sebagai satu pihak kepada usul tersebut dan mengarahkan mereka dipotong dari usul tersebut. Perayu-perayu memohon ke Mahkamah Tinggi untuk kebenaran memohon *certiorari* dan ianya dibenarkan.

Apabila usul substantif responden dibicarakan, CCB mengatakan bahawa terdapat penyekatan fakta-fakta material dan kebenaran tersebut wajar dibatalkan. Yang arif hakim menolak, oleh yang demikian CCB dan penerima merayu terhadap keputusan tersebut (Rayuan No. W-02-441-1997). Yang arif hakim juga membuat satu perintah bertarikh 30 Jun 1997 mengarahkan penambahan PhileoAllied dan BNM sebagai pihak-pihak kepada usul tersebut. Perintah ini walaubagaimanapun secara nyata tidak memasukkan penjawat BNM yang telah mengambil-alih dari penerima. Seterusnya, apabila usul substantif

dibahaskan dan yang arif hakim membuat perintah-perintah berikut: (a) dia membatalkan award mahkamah perusahaan yang berkait dengan pemotongan penerima sebagai pihak kepada usul; (b) beliau mengesahkan penambahan PhileoAllied sebagai pihak kepada prosiding Mahkamah Perusahaan; dan (c) beliau membatalkan bahagian award untuk menolak penambahan BNM dan penjawat sebagai pihak-pihak kepada prosiding ini.

Oleh yang demikian, rayuan PhileoAllied (Rayuan no. W-02-615-1999), rayuan BNM (Rayuan No. W-01-67-1999), dan rayuan CCB, penerima dan penjawat (Rayuan No. W-02-567-1999) adalah terhadap keputusan yang arif hakim. Mereka menyatakan bahawa terdapat kecacatan yang serius dalam perintah yang dibuat oleh yang arif hakim dan alasan-alasan beliau dalam membuat perintah tersebut kerana (i) beliau gagal untuk mengarahkan mindanya terhadap fakta yang bahawa fakta-fakta material telah disekat oleh responden-responden pada tahap *ex parte*; (ii) setelah membuat perintah bertarikh 30 Julai 1999, beliau sudah *functus officio* dan adalah melebihi kuasa-kuasanya untuk membuat perintah seterusnya;dan (iii) beliau gagal menghargai bahawa CCB adalah majikan sebenar, dan bahwa pihak-pihak yang lain adalah tidak perlu dan tidak wajar dimasukkan sebagai pihak-pihak kepada usul ini.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Walaupun isu ketidak-pendedahan ditimbulkan, perayu-perayu tidak dapat menunjukkan pada kesungguhan bahaawa material yang dimajukan pada tahap *ex parte* dihadapan yang arif hakim adalah berbeza secara substantial, dengan apa yang dimajukan dihadapan beliau pada pendengaran usul substantif. Tambahan pula, apabila ditelitikan keterangan pada tahap *ex parte*, mahkamah ini berpuashati bahawa jika keterangan tambahan dimajukan dihadapan yang arif hakim pada tahap *ex parte*, beliau akan juga memberi kebenaran oleh yang demikian, alasan ini tiada merit.

[2] Adalah diperhatikan bahawa perintah yang dibuat pada 30 Jun 1997 adalah ekoran dari permohonan yang dibuat secara saman dalam kamar. Ianya adalah satu perintah interim yang dibuat sementara pendengaran usul substantive. Semasa tahap interim, yang arif hakim menambah pihak-pihak kepada usul dan pada tahap akhir, beliau mendengar merit usul substantive yang dibahawa dihadapannya. Doktrin *functus officio*, dari itu, tidak mempunyai sebarang relevan sama sekali dalam kes ini, ianya adalah seumpama bezanya kapur dan keju. Oleh yang demikian, alasan ini tiada merit.

[3] Memandang keterangan secara amatan paling objektif, kesimpulan yang tidak dapat dielakkan bahawa CCB, penerima dan penjawat BNM adlah pihak-pihak yang wajar untuk mengadilan permasalahan pekerjaan dihadapan mahkamah perusahaan. Ianya mungkin menjadi alasan penerima bahawa mereka bukan dan tidak pernah menjadi majikan kepada responden-responden. Walaubagaimanapun, adjudikasi perusahaan tidak menghiraukan label. Dalam menyelesaikan permasalahan anatara majikan dan pekerja, fungsi tribunal ini tidak terhad kepada pentadbiran keadilan menurut undang-undang. Ianya bukan hanya mentafsir atau menguatkuaasa hak-hak dibawah kontrak. Ia juga dapat membuat hak-hak baru dan obligasi-obligasi di antara pihak-pihak yang mana dianggap penting untuk memberi keamanan industri.

[4] Berhubungan dengan rayuan PhileoAllied, mahkamah ini tidak setuju dengan pendakwaan responden bahawa tidak terdapat kesilapan sama ada pada perintah yang arif hakim mengesahkan ketepatan kemasukkan PhileoAllied atau komen menentang yang dibuat olehnya. Ianya sekali lagi tidak dapat dikatakan rukun keadilan asasi dapat dicabuli. Satu-satu pihak tidak dapat dihukum tanpa dibicara. Dari itu, perintah yang arif hakim berhubungan dengan PhileoAllied dan komennya yang menentang adalah tidak wajar. Oleh yang demikian, rayuan PhileoAllied dibenarkan, dan bahagian perintah yang berhubung dengan mengesahkan penambahan PhilleoAllied sebagai pihak kepada prosiding di hadapan mahkamah perusahaan diketepikan, dan komen menentang dipadam.

[5] Berhubung dengan rayuan BNM, setelah meneliti perintah yang dibuat melepaskan penerima dan melantik penjawat, tidak terdapat fakta yang munasabah atau hubungan undang-undang antara BNM dan permasalahan yang dihadapkan dihadapan mahkamah perusahaan ini. Walaupun mengambil pandangan yang ekstrem pada fakta, BNM tidak dapat dipertanggungjawabkan atas pemberhantian responden-responden. Dari itu, rayuan BNM dibenarkan setakat arahan hakim penambahn BNM sebagai pihak kepada prosiding dihadapan mahkamah perusahaan.

Rayuan No. W-02-441-1997 dan W-02-567-1999 ditolak; Rayuan No. W-02-615-1999 dan W-01-67-1999 dibenarkan setakat sebagaimana terma yang diarahkan terdahulu.]

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab-Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bharat Bank Ltd Delhi v. Employees of Bharat Bank Ltd Delhi AIR [1950] SC 304 ***(foll)***

Brinks-Matt Ltd v. Elcombe & Ors [1988] 2 All ER 188 ***(refd)***

Dormeuil Freres SA & Anor v. Nicolian International (Textile) Ltd [1988] 3 All ER 199 ***(refd)***

Dr A Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(foll)***

Esa Sa'ayon v. Woon Kim Poh [1985] 2 CLJ 283; [1985] CLJ (Rep) 810 HC ***(foll)***

Kanda v. Government of the Federation of Malaysia [1962] 2 MLJ 169 ***(refd)***

R v. Kensington Income Tax Commissioners ex p Princess Edmund De Polignac [1917] 1 KB 486 ***(refd)***

Sari Artist Film Productions Sdn Bhd v. Malaysia Film Industries Sdn Bhd [1974] 1 MLJ 123 ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20, 29(a)

(Civil Appeal No: W-02-441-1997)

For the appellants - Shahul Hameed Amirudin (P Jayasingam & T Kuhendran); M/s Zul Rafique & Partners

For the respondents - Dato' Sivaparamjothy (Ashokvijay S); M/s VK Lingam & Co, M/s Lee Hishamuddin & M/s Shook Lin & Bok

(Civil Appeal No: W-01-67-1999)

For the appellants - S Rajashree (Wong Pei Ling); M/s Cheang & Ariff

For the respondents - Dato' Sivaparamjothy (Ashokvijay S); M/s VK Lingam & Co, M/s Lee Hishamuddin & M/s Zulkifli Rafique & Partners

(Civil Appeal No: W-02-567-1999)

For the appellants - Shahul Hameed Amirudin (P Jayasingam & T Kuhendran); M/s Zul Rafique & Partners

For the respondents - Dato' Sivaparamjothy (Ashokvijay S); M/s VK Lingam & Co, M/s Lee Hishamuddin & M/s Cheang & Ariff

(Civil Appeal No: W-02-615-1999)

For the appellant - DP Naban (N Moharthas); M/s Lee Hishamuddin

For the respondents - Dato' Sivaparamjothy (Ashokvijay S); M/s VK Lingam & Co

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:
This is the judgment of the Court.

The Co-Operative Central Bank Ltd ("CCB") is not a bank at all. It is a co-operative society registered and governed by the provisions of the Co-Operative Societies Act 1948. We are advised by counsel that it is still in existence. In 1987, CCB got into financial difficulties. According to the affidavit evidence placed before us at p. 689 of the Record of Appeal in Appeal No. W-02-567-1999, the excess of liabilities over assets amounted to almost RM650 million. It was hopelessly insolvent. It had taken deposits from members of the public. There was a grave danger that innocent depositors would lose their monies. So the government acted.

It got Bank Negara Malaysia ("BNM") to move under the Essential (Protection of Depositors) Regulations 1986. On 7 January 1988 BNM exercised powers under those regulations and appointed two persons to assume control and carry on the business of CCB. On 7 March 1989 BNM applied to the High Court in Kuala Lumpur and obtained the appointment of Tuan Haji Zainal Abidin Putih and Tuan Haji Ahmad Kamal bin Abdullah Al-Yafii as the receivers of CCB ("the receivers").

After the receivers took over the conduct of CCB's businesses, they proceeded to terminate the services of all CCB's employees. This includes the 116 respondents in these four appeals before us.

Later, on 2 September 1993 on the application of BNM, the receivers were discharged and two persons were appointed to administer the affairs of CCB ("the appointees"). Subsequently, on 10 October 1994 some of the assets and liabilities of CCB were sold and transferred to PhileoAllied Bank.

The respondents, after the termination of their services, set in motion the procedure under s. 20 of the Industrial Relations Act 1967 ("the Act"). Eventually, their dispute with CCB was referred to the Industrial Court by the Honourable Minister. When the dispute reached the Industrial Court, the respondents applied to join the receivers as parties. The Industrial Court acceded to this request. The receivers then moved the High Court for an order of *certiorari*. Abu Mansor J (as he then was) acceded to that application. He quashed the decision of the Industrial Court. The respondents appealed to the Supreme Court. The main contention was that no leave was required to add parties to the proceedings. The Supreme Court set aside Abu Mansor J's decision. It restored the order of the Industrial Court and remitted the matter to that court.

When the proceedings re-commenced in the Industrial Court, an application was made to have the receivers removed as parties. This is because the order discharging the receivers had already been made. The learned Chairman after hearing arguments reserved his decision. Some one year and four months later, he delivered his interim award and held that the receivers were no longer necessary parties and ordered them to be struck out by exercising the powers conferred on him under s. 29(a) of the Act. The respondents were unhappy with that interim award. They took it before the learned judge of the High Court on an application for *certiorari*. They applied for leave and got it.

Later, on 21 March 1997 the respondents took out a summons in chambers to amend the substantive motion and to adduce further evidence by way of affidavit. When the substantive motion came on for hearing, CCB and the receivers took the point that there had been a suppression of material facts and argued that the leave should be revoked by the court. The learned judge refused that application. CCB and the receivers then appealed against that decision. It forms the subject matter of the first of the four appeals before us.

In the course of hearing the respondents' substantive motion, the learned judge, on 30 June 1997, made an order on the respondents' summons dated 25 March 1997. By that order, the learned judge directed the addition of PhileoAllied and BNM as parties to the motion. The order, however, expressly excluded the appointees of BNM who had taken over from the receivers.

Subsequently, the substantive motion was argued and the learned judge on 6 July 1999 made the following orders:

(i) he quashed so much of the award of the Industrial Court relating to the striking out the receivers as parties;

(ii) he upheld the addition of PhileoAllied as a party to the Industrial Court proceedings;

(iii) he quashed so much of the award as refusing to join BNM and its appointees as parties to the proceedings before the Industrial Court.

He also made some consequential orders.

On 9 July 1999, the learned judge clarified the order made on 6 July 1999. The clarification related to the addition of parties in the proceedings before the Industrial Court. At the time the learned judge made the orders in July 1999, there was pending an application before the Industrial Court by PhileoAllied, to have itself struck out from the proceedings as parties. That application had not been heard. We are advised by counsel that the application was to have been taken together with the hearing of the substantive dispute before the Industrial Court.

When the learned judge came to write his judgment, he held that the Industrial Court had been right in joining of PhileoAllied as a party to the proceedings before it. PhileoAllied was unhappy with the comments made by the learned judge and so much of the order as upheld its addition as a party. It appealed against that part of the judgment of the learned judge. That appeal now forms the subject matter of Appeal No. W-02-615-1999.

BNM was also dissatisfied with the order of the learned judge adding them as a party to the Industrial Court proceedings. It too lodged an appeal which forms the subject matter of Appeal No. W-01-67-1999.

CCB, the receivers and the appointees of BNM were equally dissatisfied with the decision of the learned judge delivered on 6 July 1999. They appealed against those orders as clarified on 9 July 1999. Their appeal is the subject matter of Appeal No. W-02-567-1999.

Although there are four appeals before us, they raise common questions of facts and law. We have, therefore, with the consent of all counsel, heard four appeals together. For convenience, we will take the appeals by CCB, the receivers and the appointees first.

Mr Shahul Hameed Amirudin and Mr P. Jayasingam have argued that there are serious defects in the orders made by the learned judge and his reasons for making those orders. It has been submitted that the learned judge was wrong because:

(i) he failed to address his mind to that fact that material facts had been suppressed by the respondents at the *ex parte* stage;

(ii) having on 30 June 1997, expressly excluded the BNM appointees from being added as parties, he purportedly reversed himself and ordered their joinder on 9 July 1997. Thus, it is said that it offends the rule of *functus officio* governing final orders of the High Court. In other words, what it is contended is that having made his order on 30 July 1999 he was *functus officio* and it was beyond his powers to make the orders he made on 6 July 1999;

(iii) he failed to appreciate, sufficiently or at all, that CCB was the real employer, that it was in existence, and the other parties, namely, the receivers and the appointees of BNM were unnecessary and ought not to have been added as parties.

We will take the first argument on non-disclosure. Although this point was raised, neither Mr. Jayasingam nor Mr. Shahul Hameed Amirudin have been able to demonstrate to a conviction that the material placed at the *ex parte* stage before the learned judge was at variance substantially, with that which was placed before him on the substantive motion. Mr Shahul Hameed Amirudin has drawn our attention to a number of cases on injunctions including the leading case of *Sari Artists Film Productions Sdn Bhd v. Malaysia Film Industries Sdn Bhd* [1974] 1 MLJ 123. We agree that the principles governing *ex parte* applications for injunctions are the same as those governing leave applications under O. 53 of the Rules of the High Court 1980.

The *locus classicus* upon the subject is *R v. Kensington Income Tax Commissioners ex-parte Princess Edmund De Polignac* [1917] 1 KB 486. There, in the Court of Appeal, Lord Cozens-Hardy MR stated the principles as follows (at p. 504):

> It is a case in which it seems to me there was plainly a suppression of what was material, and we cannot be too strict in regard to that which to the best of my belief has been a long established rule of the Court in applications of this nature and has been recognized as the rule. The authorities in the books are so strong and so numerous that I propose to mention one which has been referred to here, a case of high authority, *Dalglish v. Jarvie* ([1850] 42 ER 89), which was decided by Lord Langdale and Rolfe B. The head-note, which I think states the rule quite accurately, is this: 'It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward.' Then there is an observation in the course of the argument by Lord Langdale: 'It is quite clear that every fact must be stated, or, even if there is evidence enough to sustain the injunction, it will be dissolved.' That is to say he would not decide upon the merits, but said that if an applicant does not act with uberrima fides and put every material fact before the Court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh application.

R v. Kensington Income Tax Commissioners was a case of a writ of prohibition. It is of interest to note that *Daglish v. Jarvie* was referred to as a case concerning an injunction.

The requirement that a party must make full disclosure of all relevant and material facts at the *ex parte* stage has not been one that has remained static. There have been developments since the the *Kensington Commissioners*' case.

In *Brinks-Matt Ltd v. Elcombe and Others* [1988] 2 All ER 188, the English Court of Appeal after considering the judgment of the court in *R v. Kensington Tax Commissioners* went on to state a principle which we consider to be of some importance. It has been neatly summarised in the headnote to that case as follows:

> Whether a fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of that fact to the issue to be decided by the judge on the application. The fact that the non-disclosure was innocent, in the sense that it was not known to the applicant or that its relevance was not perceived, is an important, but not decisive, consideration in deciding whether to order an immediate discharge.

In *Dormeuil Freres SA and another v. Nicolian International (Textile) Ltd* [1988] 3 All ER 199, Sir Nicolas Browne-Wilkinson V-C (now Lord Browne Wilkinson) expressed views not dissimilar to those in the *Brinks-Matt*'s case which he referred to in his judgment.

Finally, closer to home, in *Esa bin Sa'yon v. Woon Kim Poh* [1985] 2 CLJ 283; [1985] CLJ (Rep) 810, Mahadev Shankar J (as he then was) had this to say in connection with the application for the discharge of an injunction on the ground of material non-disclosure:

> The grant of an injunction is the subject of a discretion which must of course be judicially exercised in all the circumstances of the case. Suppression and/or concealment are pejorative words, which import a culpable intent, to mislead the court. It would be futile to attempt to provide a comprehensive definition here of what such an intent would cover. At one end of the spectrum, must be a situation where an objective appraisal of facts not disclosed, would have resulted in the injunction not being granted at all. Towards the other end of the spectrum must be the situation where, there is a subjective apprehension on the part of the applicant, that if the entire history of the dispute is laid out on the Bar Table, the injunction might not be so readily available. The dilemma between brevity and prolixity is always a perennial problem in advocacy.

For our part, we would with gratitude, accept what his lordship said in that case and adopt it as a part of this judgment.

Returning to the arguments of counsel, all that Mr. Shahul Hameed Amirudin had to say was that there was certain evidence in the proceedings in the Industrial Court which was omitted initially and which was brought to the attention of the High Court later by way of additional evidence at the hearing of the substantive motion.

We have carefully scrutinised the evidence at the *ex parte* stage and are left entirely satisfied that even if the additional evidence had been placed before the learned judge at the *ex parte* stage, he would have still granted leave. In fairness to the respondents, we are unable to detect any culpability by them. We are therefore satisfied that there is no merit in this argument.

The thrust of the argument on the second point was that the learned judge had no powers to make the orders he did on 6 July 1999 and 9 July 1999 as he was by then *functus officio*. As was observed by the Federal Court recently in *Badiaddin bin Mohd Mahidin & Anor v. Arab-Malaysian Finance Bhd* [1998] 2 CLJ 75, the doctrine of functus officio forms part and parcel of the wider principle of estoppel. Upon close scrutiny of the counsel's argument, it is to be observed that the order made on 30 June 1997 was in response to an application made by a summons in chambers. It was an interim order made pending disposal of the substantive motion. At the interim stage, the learned judge was adding parties and in the final stage, he was hearing merits of the substantive motion before him. The doctrine of *functus officio* therefore has as much relevance to this case as cheese has to chalk. There is therefore no merit in this argument.

Now we come to the third point raised. Here it is submitted that no reasonable tribunal properly directing itself to the facts and the law would have come to the conclusion that the Industrial Court had erred in striking out the receivers as parties and refusing to join BNM and its appointees as parties to the dispute. We would put aside our view on the addition of BNM for the moment and confine ourselves to the receivers and the BNM appointees.

It is clear from the facts that the respondents' services were terminated by the receivers. It is equally clear from the order discharging the receivers that the appointees of BNM, and we quote from the terms of the order, "be responsible for all liabilities ... properly incurred" by the 2nd and 3rd appellants as receivers and managers of CCB. It is therefore clear that the appointees only held themselves responsible to the court for such acts as were within the proper exercise of the function of the receivers.

In the proceedings before the Industrial Court, it would be necessary for the adjudicating panel to determine as to who was the real employer at the material time. Here we have a case which is not entirely straight forward. In *stricto sensu*, it was not CCB which terminated the contracts of employment. It was the receivers. But they are no longer in the picture. They have been replaced by the appointees of BNM. One cannot help gaining the impression that the receivers on the one hand and the appointees on the other hand are equally

keen to wash their hands off the trade dispute now looming in the Industrial Court. It is reasonably plain from the fact pattern that one of the questions that the Industrial Court will have to determine: "who is the person responsible for the termination of employment?" It is trite law that more than one person may be responsible for dismissing an employee without just cause or excuse. Therefore, viewing the evidence with utmost objectivity, we cannot escape the conclusion that CCB, the receivers and the appointees of BNM are all necessary parties for the adjudication of the trade dispute before the Industrial Court. It may well be the receivers' argument that they are not and have never been the employers of the respondents. However, industrial adjudication is no respecter of labels. In *Dr A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304 at 312, Chang Min Tat FJ cited the judgment of Mukherjee, J in *Bharat Bank Limited Delhi v. Employees of Bharat Bank Ltd Delhi* AIR [1950] SC 304 where it was said:

> In settling disputes between employers and workmen the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace.

For these reasons, we strongly dissent from the argument advanced by Mr. Shahul Hameed Amirudin and Mr. Jayasingam. In our judgment, the learned judge was entirely correct in holding that the joinder of BNM, the receivers and the BNM appointees are a *sine qua non* for the resolution of this dispute. For reasons given so far both the appeals No. W-02-441-97 and W-02-567-99 are dismissed. The appellants must pay the costs of these appeals to the respondents.

That brings us to the appeal of PhileoAllied Bank. We were urged by Dato' V Sivaparanjothi that there was nothing wrong in either the order made by the learned judge confirming the correctness of the addition of PhileoAllied or the adverse comments made by him.

With respect, we are unable to agree. It cannot be gainsaid that the rules of natural justice should not be violated. A party cannot be condemned without being heard. As Lord Denning said in *Kanda v. Government of the Federation of Malaya* [1962] 2 MLJ 169:

> In the opinion of Their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua*: and *Audi alteram partems*. They have recently been put in two words Impartiality and Fairness. But they are separate concepts and are governed by separate considerations.

With respect, the order of the learned judge in respect of PhileoAllied and his adverse comments about them were entirely unwarranted. Accordingly, we would allow PhileoAllied's appeal.

So much of orders dated 7 July 1999 and 9 July 1999 as upholds the addition of PhileoAllied as a party to the proceedings before the Industrial Court are set aside. The adverse comments against PhileoAllied are to be expunged. No reference is to be made to those passages in future proceedings connected with these litigations. But it must be remembered that the respondents are not the authors of this scenario. In our judgment, they bear no responsibility. In fairness to them, they were arguing quite a different point. We are therefore satisfied that there should be no order as to costs against the respondents. Consequently, Appeal No. W-02-615 of 1999 is allowed. The deposit is to be refunded to PhileoAllied.

We now turn to BNM.

Once again, Dato' Siva has argued that BNM is a necessary and proper party. Ms. Rajashree has argued that BNM is not. She subsequently argued that the Industrial Court had no jurisdiction to make an adjudication against BNM because of s. 52 of the Act. In our judgment, this section has nothing to do with the case. This case is not about the dismissal by BNM of one of its employees.

Nevertheless, having scrutinised the order dated 2 September 1993 pursuant to which the receivers were discharged and the appointees were appointed, we are unable to see any reasonable factual or legal nexus between BNM and the dispute presently before the Industrial Court. Even taking the most extreme position on the facts, we are unable to perceive a situation whereby BNM can be held responsible for the termination of the respondents. We have therefore come to the conclusion that Appeal No. W-01-67-1999 has merit. We allow it in so far as the judge directed the addition of BNM as a party to the proceedings before the Industrial Court. The order is hereby set aside.

One final word. It has been some 11 years since the letters terminating the 116 employees were issued. Yet, the case for dismissal has not yet been heard by the Industrial Court. All litigation including industrial litigation involves some delay. That is inevitable. But it is a tragic circumstance upon the justice system that 116 people had to wait for 11 years before they are made aware whether their case can take off before the Industrial Court. We are vexed as to how such a problem can be overcome. We offer no solution. All we suggest is the speedy disposal of the cases and the refusal of the Industrial Court to entertain any further preliminary objections.

In summary, our decisions are as follows:

(i) Appeals No. W-02-441-1997 and W-02-567-1999 are dismissed with costs. The deposit will go to the respondents to account of their taxed costs;

(ii) Appeals No. W-02-615-1999 and W-01-67-1999 are allowed to the extent as on the terms earlier indicated;

Before concluding, we would like to thank all counsel for their careful and concise arguments. But for their assistance, these appeals would have been an insurmountable task.